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CIVILIZING PUNITIVE DAMAGES: LESSONS FROM RESTITUTION

Gail Heriot*

I. INTRODUCTION

Some courts have been very tough on punitive damages. “The idea is wrong,” said the Supreme Court of New Hampshire in 1872 calling it “a monstrous heresy.”¹ “It is an unsightly and an unhealthy excrescence,” the court continued, “deforming the symmetry of the body of the law.”²

These were strong words—strong enough to make some readers wince with embarrassment—but perhaps the good justices of the Granite State had a point. In our legal system, a rather sharp (if not always perfect) distinction is drawn between criminal law, which emphasizes punishment, and civil law, which stresses compensation.³ Even school children know something about the distinction between being sued and being prosecuted for a crime.⁴

Punitive damages are a significant anomaly in a system with many anomalies. In awarding them, courts make no pretense of compensatory purpose; punitive damages are awarded, just as the

* Professor of Law, University of San Diego. I would like to thank Michael Kelly, Emily Sherwin, Christopher Wonnell, and the participants in Washington & Lee University School of Law’s Forum on Remedies for helpful comments and insights on this Article and on the subject of remedies generally.

1. *Fay v. Parker*, 53 N.H. 342, 382 (1873); *see also* 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 240 n.2 (16th ed. 1899).

2. *Fay*, 53 N.H. at 382.

3. In general, an outside observer might say that the criminal system is for punishing wrongdoers who breach the special body of law designated as “criminal” and the civil system is for compensating the victims of a broader range of wrongdoing.

4. Among the differences is the level of procedural safeguard afforded to defendants. On the criminal side, such safeguards abound. On the civil side, however, the playing field between plaintiffs and defendants tends to be more level. *See* Gail Heriot, *The Practical Role of Harm in the Criminal Law and the Law of Tort*, 5 J. CONTEMP. LEGAL ISSUES 145, 145 (1994).

name suggests, as punishment—something we ordinarily associate with the criminal law.

Courts have been reluctant to find constitutional infirmities in the concept of punitive damages.⁵ Perhaps they are right to be so; punitive damages arguably have a long pedigree, and that ought to count for something. Not every legal practice that is constitutional, however, is also good policy. The issue remains whether their awkward fit into the legal system really does make them “an unhealthy excrescence” on the law and what, if anything, should be done to reform them.⁶

This Article will suggest that punitive damages do indeed present special risks of injustice not present in ordinary civil or criminal cases. While calling punitive damages a “monstrous heresy” and an “unhealthy excrescence” may be amusingly over-the-top, there are reasons to give some thought to how to create a legal system that could “civilize” them (in the sense of making them a better fit into the civil law). It will further suggest that among the extra-compensatory remedies that deserve consideration as an alternative to punitive damages under certain circumstances is restitution. If restitution were substituted for punitive damages, it would not result in a perfect or even near-perfect set of incentives for plaintiffs and defendants to live under, but it might have advantages over the current practice.

5. See, e.g., *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); see also Gail Heriot, *An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages*, 7 J. CONTEMP. LEGAL ISSUES 43 (1996).

6. An interesting and worthwhile literature has developed over the last few decades on punitive damages, which includes: Kenneth Abraham & John Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415 (1989); Robert Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79 (1982); Dorsey Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982); David Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982); David Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258 (1976); George Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123 (1982); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998); Symposium, *Punitive Damages*, 40 ALA. L. REV. 705 (1989).

II. THE PROBLEM WITH PUNITIVE DAMAGES

Putting one's finger on exactly why many people are troubled by punitive damages is tricky. It cannot be that punishment is an impermissible purpose in the civil law—at least in the broadest sense of the term “punishment.” Every time a defendant is found liable and ordered to pay compensatory damages to a plaintiff, part of the motivation for doing so is punishment.⁷ Otherwise, why order the *defendant* to pay as opposed to someone in a better financial position to offer compensation.⁸

The argument for holding the person who caused the harm liable would be pretty weak if the only justification for tort law were compensation or loss spreading. Not all wrongdoers can afford to cover the losses they have inflicted on others. Many, as their chagrined victims learn, are completely judgment-proof; others may be more financially strapped than their victims. An insurance pool, whether financed by taxpayers, victims, or wrongdoers, would be a better method of compensating victims, since it could ensure that *all* victims are compensated, not just those lucky enough to be injured by someone with the resources to pay damages.⁹

Yet almost everyone agrees that such a system would not be satisfying. The wrong person would be forced to pay and the person who should have paid would go . . . well . . . unpunished. Under the circumstances, it is hard to argue that punishment is an impermissible purpose of the civil law.¹⁰

In the ordinary civil case, however, the twin purposes of compensation and punishment are bound together—and that is crucial. Plaintiff is compensated only to the extent that defendant is punished, and defendant is punished only to the extent that plaintiff is compensated. In addition (and perhaps consequently), the rhetoric of punishment is downplayed. Frequently, as in the case of strict liability torts, no explicit moral condemnation is made at all. Forcing the defendant to pay compensation is thus punishment only in a

7. See Kenneth B. Noble, *In Civil Court, A Second Chance at Retribution*, N.Y. TIMES, Oct. 22, 1995, § 3–4, at 5 (discussing the O.J. Simpson civil cases).

8. For an attempt to reconcile deterrence and corrective justice approaches in tort law, see Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).

9. See Heriot, *supra* note 4, at 151.

10. See *id.*

limited sense: Defendant is made worse off by having to pay damages, but his conduct is not explicitly prohibited or even condemned. He is simply reminded when he writes out his check to plaintiff that *perhaps* he should reconsider his behavior in the future.¹¹

The civil law, particularly the law of tort, is otherwise remarkably vague and amorphous. In contrast to the criminal law, no attempt is made to specify in writing those acts which can give rise to liability or to make such a writing broadly available to the public. Potential tort defendants are thus not forewarned of the range of prohibitions on inappropriate conduct.

This vagueness allows flexibility: tort law can adjust itself immediately to whatever new-fangled acts of negligence human folly can dream up. It is also extremely worrisome, however, for as Lord Camden once wrote, "discretion . . . is the law of tyrants."¹² In the case of a negligence tort, twelve randomly selected jurors decide whether they regard the defendant's conduct as reasonable or not. These twelve jurors may be representative of community sentiment or they may not be.¹³ They may be motivated by an honest desire to apply the law or they may not be. In any event, they are accountable to no one; they are not even bound, as judges are in deciding common law issues, to decide the issue before them in harmony with previous cases.

This would be intolerable but for tort law's compensatory nature. It does not permit anyone to be punished who has not actually caused harm to a victim. Even when harm is clear, it does not permit punishment unless that victim explicitly requests the court to award him compensation. Further, it inflicts punishment only to

11. See *id.* (commenting on the notion of corrective justice in tort law).

12. The fuller version of Lord Camden's statement is, "[t]he discretion of a judge is the law of tyrants: It is always unknown: It is different in different men: It is casual, and depends upon constitution, temper and passion—In the best it is often times caprice: In the worst it is every vice, folly, and passion, to which human nature can be liable." 8 A COMPLETE COLLECTION OF STATE TRIALS 57 (1816).

13. See Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998) (noting wide but imperfect consensus among individuals regarding what constitutes outrageous conduct); see also David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000) (suggesting that jury deliberation may make jury outcome more rather than less polarized).

the extent of that harm. These limitations “civilize” a body of law that would otherwise vest entirely too much discretion in courts. Of course, tort juries can still be capricious and unfair, but there are limits to the reach of their power.¹⁴

Contrast all that with the criminal law, which without its many procedural safeguards, could also be quite a dangerous tool. The safeguards that tame the criminal law, however, are quite different from those found in the civil law. Unlike a tort defendant, a criminal defendant must ordinarily be charged with the violation of a provision of the criminal code before he can be punished.¹⁵ While criminal codes are not always models of clarity, the notion that justice requires a fair notice of prohibitions is widely accepted.¹⁶ Once charged, the criminal defendant must be proven guilty beyond a reasonable doubt.¹⁷ Illegally obtained evidence is excluded, and various guarantees of counsel apply.¹⁸ The system is very much skewed in favor of the defendant.

Because the two systems have very different ways of preventing abuse, mixing them can be hazardous. It would be intolerable, for example, if the vague and flexible standards of tort law were transferred to the criminal context, where there is no requirement that the defendant’s punishment come in the form of compensation for an actually-inflicted harm to an actual complaining witness. If jurors were free to convict and punish anyone whose conduct they find

14. Put another way, binding together the purposes of compensation and punishment significantly cuts down on (though it does not eliminate) the likelihood that a person will be unfairly targeted for persecution through the tort system. Trial lawyers hoping to get rich by riding the next wave of litigation will still look for defendants who are unpopular with the public. However, it will do them no good if they cannot prove their target caused an actual harm to their clients. This makes the tort system an unwieldy weapon in the hands of the unscrupulous.

15. See, e.g., *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812); GA. CODE ANN. § 26-201 (1998); KAN. STAT. ANN. § 21-3102 (1995 & Supp. 2001). But see N.M. STAT. ANN. § 30-1-3 (Michie 2002).

16. See *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (“Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.”).

17. See Heriot, *supra* note 4, at 153.

18. See *id.*

unreasonable, no one would be safe—except those secure in the knowledge that they are universally loved. Ambitious prosecutors would succumb to the temptation to please the crowd by dragging unpopular persons into criminal courts on vague and ambiguous charges. All the prosecutor would need to do is find *something* that the defendant did that a jury could find unreasonable. Convincing jurors that the defendant could have hurt someone would be just as good as convincing them that he did in fact hurt someone.

Punitive damages fit only awkwardly into this framework. In some ways, they follow the ordinary pattern in tort and in some ways they do not. Like other tort cases, a case for punitive damages must be initiated by a tort victim, who at least in theory, must demonstrate that he has actually been injured by a defendant.¹⁹ The structural commonalities, however, stop there. Defendant's punishment is not limited to the amount necessary to compensate plaintiff for his injury. Indeed, that is the whole idea—to go beyond compensation and punish for punishment's sake. There is no real theoretical basis upon which to determine whether the defendant is being over-punished. Additionally, unlike ordinary tort cases, cases for punitive damages involve clear and explicit judgments about the defendant's moral turpitude. In some ways, therefore, they are like civil cases—without most of the usual safeguards provided by tort law's stress on compensation. In other ways, they are like criminal cases—again without the procedural protections ordinarily accorded to criminal defendants.

This ought to be enough to raise concerns about punitive damages. And, of course, it has. Punitive damages are one of the few legal issues that non-lawyers are familiar with. Some cases in which juries have awarded extraordinary punitive damages for comparatively trivial wrongs—most notably the McDonald's case—are legendary.²⁰ Over the past several decades, the perception that a

19. At one point, in West Virginia, juries were permitted to award punitive damages without awarding compensatory damages "provided there is evidence showing an injury to the plaintiff caused by the egregious and tortious conduct of the defendant." *Wells v. Smith*, 297 S.E.2d 872, 880 (W. Va. 1982). This has now been overruled. See *Garnes v. Fleming Landfill*, 413 S.E.2d 897, 899 (W. Va. 1991); *Rohrbaugh v. Wal-Mart Stores, Inc.*, 572 S.E.2d 881, 886 (W. Va. 2002).

20. See *Liebeck v. McDonald's Rest. P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994).

punitive damages crisis exists has been expressed many times.²¹ Whether an across-the-board punitive damages crisis affecting the law generally exists or not may be open to argument.²² What is not open to argument is that punitive damages awards in previously unheard of amounts are now awarded periodically in areas like insurance coverage and products liability—areas in which improper resentments on the part of jurors are known to surface on occasion. In the past few years, juries have assessed punitive damages in the amounts of \$4.9 billion and \$3 billion in Southern California products liability cases alone.²³ Moreover, the notion that punitive damages are comparatively rare (outside those areas) is no comfort to any defendant who is in fact the victim of unbridled jury discretion.

III. PUNITIVE DAMAGES AND THE COURTS

It is fair to say that applicable legal standards for determining whether a punitive damages award is appropriate and the amount that should be awarded are often quite amorphous and that courts are hardly eager to intervene once a jury has made a determination.²⁴

In California, for example, punitive damages may be considered and awarded in any “action for the breach of an obligation not arising from contract, where . . . the defendant has been guilty of oppression,

21. See *Oki America v. Int'l, Inc.*, 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring) (“I suppose we will next be seeing lawsuits seeking punitive damages for maliciously refusing to return telephone calls or adopting a condescending tone in interoffice memos.”); Sunstein, *supra* note 13, at 2075–81.

22. See William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, Reg. Sept.-Oct. 1986 at 33; Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1275–84 (1993).

23. See Myron Levin & Dalondo Moultrie, *L.A. Jury Awards \$3 Billion to Smoker*, L.A. TIMES, June 7, 2001, at A1; Ann W. O'Neill et al., *GM Ordered to Pay \$4.9 Billion in Crash Verdict*, L.A. TIMES, July 10, 1999, at A1. Both these awards were later reduced somewhat. See Anna Gorman, *Huge Award to Smoker Cut by Judge*, L.A. TIMES, Aug. 10, 2001, at B1 (the award against Philip Morris was cut to a still-huge \$100 million); Peter Hong, *Judge Cuts Award Against GM to \$1.2 Billion*, L.A. TIMES, Aug. 27, 1999, at B1 (a California Superior Court judge later ordered the General Motors punitive damages award reduced to the still astronomical \$1.2 billion).

24. See, e.g., Schkade, *supra* note 13, at 1148 (the jury's unpredictable judgments “helps explain the observed variability in dollar awards in many areas of the law.”).

fraud, or malice”²⁵ “Malice,” however, is defined in the statute not in its usual dictionary sense of “ill will,” but rather as “conduct . . . intended . . . to cause injury . . . or despicable conduct . . . carried on . . . with a conscious disregard of the rights or safety of others.”²⁶ Such a standard allows juries to award punitive damages not just in cases involving ill will or evil motive, but in a broad range of tort cases in which the defendant was merely aware that his conduct resulted in increased risk to others.²⁷ The automobile driver who continues to drive despite the knowledge that one of his tail lights is out may well go to the jury under such a standard. The jury is essentially free to punish or not punish as it sees fit, though presumably it is most likely to do so in real cases of ill will.

Determining the amount of damages is similarly open-ended. No one has a clear idea on how juries should arrive at a dollar figure. They are essentially left to their own devices, and courts are disinclined to interfere.²⁸

In *BMW of North America, Inc. v. Gore*,²⁹ the United States Supreme Court suggested that due process requires *some* proportionality between the harm that plaintiff suffered and the size of any punitive damage award.³⁰ It also suggested, however, the need for proportionality between punitive damages and both the harm plaintiff *could have* suffered and the reprehensibility of defendant’s conduct.³¹ Furthermore, issues such as the extent to which the defendant’s conduct fits a pattern and whether same or similar harms to others have gone undetected are also considered.³² As the yardsticks multiply, it becomes easy for a jury to hide behind them. Suppose a jury really did assess punitive damages against an insurance company solely because the jurors wanted to take out their wrath against large companies generally. With so many possible

25. CAL. CIV. CODE § 3294 (West 1997 & Supp. 2003).

26. *Id.* § 3294(c)(1).

27. *See* *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 810 Cal. Rptr. 348, 382 (1981).

28. *See* Schkade, *supra* note 13, at 1139–44.

29. 517 U.S. 559, 580–81 (1996).

30. *See id.*

31. *See id.* at 581.

32. *See id.* at 581–83.

ways to justify high punitive damages, who will know the jury's actual motivation?³³

BMW itself turned out to be one of the few cases in which a court has been willing to knock out a multi-million dollar award of punitive damages on constitutional grounds.³⁴ The case involved an award of punitive damages that was remarkably disproportionate to the culpability of the defendant's conduct and to the damage done to the individual plaintiff.³⁵ Indeed, it was an odd case for the award of punitive damages at all.

The plaintiff, a Birmingham, Alabama physician had purchased a 1990 BMW 535i automobile for \$40,750.88.³⁶ Unbeknownst to him, part of the car had been re-painted prior to sale. Such an occurrence is apparently not uncommon. New cars sometimes receive minor nicks and scratches while still in the possession of the manufacturer. Rather than sell them "as is," manufacturers perform the minor body work needed to get them in shape to sell. In this case, the original damage was very minor. It was repainted at the cost of \$601.

Apart from the *BMW* jurors, few would have ranked BMW's failure to disclose as an egregious wrong. At the time of the sale, some states required automobile manufacturers to disclose repairs exceeding 3% of the value of the vehicle; others did not require disclosure unless the repairs reached 6%; and some states did not require disclosure at all.³⁷ No state required manufacturers to disclose a repair, such as the one involved in the case, that amounted to only 1½% of the value of the vehicle.

Indeed, some might say that BMW had actually been quite a good corporate citizen in its disclosure policy. In the interest of uniformity, it had adopted the strictest policy required by any state—the 3% threshold—and applied it across the country. Repair to Dr. Gore's car had not met even that threshold, however, so neither the

33. In the end, the *BMW* Court declared, "Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula . . ." *Id.* at 582. All one can do is agree. There is indeed no such formula, which means court supervision of jury awards will be minimal.

34. *See id.* at 559.

35. *See id.*

36. *See id.* at 563.

37. *See id.* at 569 n.13.

dealer nor Gore had been informed. BMW believed—correctly—that a line had to be drawn somewhere about disclosing a car's history. Only in the cartoons do cars come off the assembly line absolutely identical. In the real world, each has its own history. On one car, a trainee might have had greater difficulty attaching the doors than others. Another may have initially flunked inspection on its steering column and needed to undergo adjustment. As Gilda Radner would have said, "It's always something."

Dr. Gore might never have learned of the paint repair but for a simple twist of fate. After driving the car for approximately nine months, Dr. Gore took it to Slick Finish, an automobile detailing shop, not because he was dissatisfied with the car's finish, but rather because he wanted to make the car look "snazzier than it normally would appear."³⁸ The proprietor was able to spot evidence of the car's history and pointed it out to Dr. Gore.³⁹

Interestingly, after the case was brought, the Alabama legislature addressed the disclosure issue. It adopted a less stringent standard than BMW's.⁴⁰ Hence, under the Alabama statute, BMW's conduct would not only have been the kind of egregious wrong not ordinarily associated with punitive damages, but would not have been a wrong at all.

The jury took a different view from the legislature and awarded \$4,000 in compensatory damages and \$4,000,000 in punitive damages for BMW's failure to disclose.⁴¹ These figures were based on the suggestion at trial that re-painting an automobile would reduce its value by 10% and that BMW had failed to disclose refinishing performed at a cost of \$300 or more approximately 1,000 times over a ten-year period.⁴²

The Alabama Supreme Court balked and reduced the award to \$2,000,000.⁴³ The United States Supreme Court, dissatisfied with

38. See *BMW of North America*, 517 U.S. at 563.

39. See *id.*

40. See ALA. CODE § 8-19-5(22) (1993) (requiring disclosures of repairs costing 3% of the value of the vehicle or \$500, whichever is greater).

41. See *BMW of North America*, 517 U.S. at 565.

42. See *id.* at 564.

43. The Court seemed confused as to why. It stated that only sales taking place in Alabama could qualify as a basis for awarding punitive damages. Rather than remand for a re-determination of punitive damages based on Alabama sales, it simply reduced the award by 50%—despite the fact that Alabama sales were closer to 1% of the total. See *id.* at 567.

that treatment, reversed and remanded, holding that even \$2,000,000 was grossly excessive and hence a violation of the defendant's due process rights.⁴⁴ Defendant's conduct was not, in the view of the Court, particularly reprehensible. Under the circumstances, a 500 to 1 ratio of punitive damages to actual harm to plaintiff was unconstitutionally excessive.⁴⁵

BMW of North America, Inc. v. Gore was important because it made clear that there are constitutional limits to the arbitrary award of punitive damages. The most striking aspect of the case, however, is its demonstration of how far out those limits are as a practical matter. It is not every day that a jury awards millions of dollars of damages in a case involving a relatively trivial wrong that legislatures had the opportunity to prohibit specifically, but declined to do so.⁴⁶ More common will be the cases in which the jury has abused its discretion by awarding punitive damages for improper reasons yet defendant is unable to demonstrate that abuse with evidence.

IV. ARGUMENTS FOR PUNITIVE DAMAGES

It would be naive to expect courts to examine punitive damage awards on a careful case-by-case basis. The law of punitive damages is set up to be highly discretionary. Courts are in no position to police the system effectively. Under the circumstances, it is fair to ask whether the common law should afford juries so much discretion given how easily it can be abused and that it will be the rare case in which abuse can be detected. Are the advantages of traditional punitive damages doctrine sufficient to justify the problem?

The traditional arguments for punitive damages tend to be two-fold. First, it is argued that they are a method of ensuring that, at least in the case of highly reprehensible activity, plaintiffs will be

44. *See id.* at 585–86.

45. *See id.* at 582–83.

46. *See* Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Damage Awards Will Be Reduced*, 7 SUP. CT. ECON. REV. 59, 83 (1999) (“BMW is a constitutional decision and one should not expect the Constitution to play a role in routine punitive damages cases.”).

fully or near-fully compensated for their injuries.⁴⁷ Second, it is argued that punitive damages are necessary in order to deter highly reprehensible conduct effectively.⁴⁸

A. Full Compensation

If the first argument were intended as a stand-alone argument, it would be a curious one. Why should complete compensation be regarded as an especially important goal in the case of highly reprehensible conduct? Why not have complete compensation for victims of ordinary negligent conduct? The obvious answer would be that punishment is especially important in a case involving reprehensible conduct, but that answer would take us to the second argument for punitive damages.

If victims of reprehensible conduct have a greater claim to full compensation than other victims, that goal can (and should) be accomplished by a mechanism other than punitive damages. Simply authorizing the trier of fact to add punitive damages to legally compensatory damages is no guarantee that total damages will be a credible approximation of plaintiff's actual losses. Indeed, it is more likely the opposite, an assurance that total damages will bear no particular relation to actual damages.

If the goal is to compensate such victims fully, why not instruct jurors that if they find defendant's conduct to be particularly reprehensible, they should take care to ensure that the plaintiff is placed in the same position he would have been in but for the defendant's wrong—or at least as close as one can come with money? This would likely include recovery for attorneys' fees and could also include, in some cases, economic and emotional damages that otherwise might be unavailable to ordinary plaintiffs. However, it would not be as open-ended as the current system of punitive damages. In this way, converting punitive damages to compensatory damages would "civilize" them.

B. Full Deterrence

More interesting is the second argument: that punitive damages are a necessary deterrent to reprehensible conduct in some cases. If

47. See Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982).

48. See *id.*

true, this is an important argument. Yet is it true? If so, in what kinds of cases? Are open-ended punitive damages assessed against the reprehensible conduct really the best or only way to handle the problem?

In the ordinary tort case, the notion that super-compensatory damages are necessary for effective deterrence is probably false. Plaintiff's injury will outweigh whatever gain defendant squeezed out of his wrongful conduct; that is why the conduct is considered negligent.⁴⁹ Thus, so long as he believes that the law is likely to be administered similarly in the future, holding defendant liable for the plaintiff's loss will ordinarily be enough to deter him from his wrongful conduct in the future. This will be true even if the conduct is reprehensible or motivated by ill will.⁵⁰ Assessing punitive damages in such a situation is superfluous.

On the other hand, not every case will be the ordinary case. Sometimes, a defendant's gain from wrongdoing *is* greater than the loss he has inflicted on the plaintiff.⁵¹ Assuming that the conduct in

49. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173–74 (2d Cir. 1947).

50. For example, I will admit to a deep desire to take my car keys and scratch automobiles whose owners deliberately take more than one parking space in crowded lots. I am motivated by ill will (or is it righteous indignation?). Punitive damages, however, are hardly necessary to deter me. I cower at the thought of compensatory damages, especially considering the ostentatious vehicles whose owners are most likely to engage in this conduct. Yes, I have a taste for inflicting pain in this situation, but I am unwilling to indulge it if it will cost me more than \$3.

51. These cases open a new can of worms. If the profits that accrue to defendant as a result of his supposed wrongdoing are really greater than the losses he has imposed on the plaintiff, is his conduct wrongful at all? The answer may be sometimes yes and sometimes no. Learned Hand's famous formula in *Carroll Towing Co.*, 159 F.2d at 173, tells us that if the burden of a precaution is less than the probability of loss if the precaution is not taken multiplied by the anticipated loss ($B < P \times L$), then the failure to take that precaution is negligence. Just as importantly, if the burden of a precaution is greater than the probability of loss multiplied by the anticipated loss ($B > P \times L$), the defendant is innocent of negligence. However, casebooks are full of another kind of case—one in which the defendant's wrong is a clear violation of the defendant's property rights despite the fact that his gain outweighs the plaintiff's loss in a particular case. In these cases that are governed by property rules rather than liability rules, wrongs are not judged based on the circumstances of each case (along the lines of *Carroll Towing*) but rather according to wholesale rules. Defendant may have gained more than plaintiff lost in the particular case, but we do not expect that defendants who engage in

such cases is actually wrongful and needs to be deterred, damages will ordinarily be insufficient to deter it.⁵² It does not follow, however, that assessing open-ended punitive damages against particularly reprehensible conduct is the best way to supplement deterrence. Indeed, the reprehensibility of the defendant's conduct may be a particularly poor method for determining which cases may need extra deterrence.

Restitution and the law of unjust enrichment is an interesting alternative. Unlike compensatory damages or punitive damages, restitution, in theory, has the virtue of providing a level of deterrence (when combined with the cost of litigation) sufficient to make the rational defendant regret his actions. Also, unlike punitive damages, the focus is on those cases for which extra deterrence is plausibly necessary (because the defendant has benefited more than plaintiff has gained) rather than simply upon those cases in which the defendant's conduct was particularly reprehensible. If one were looking to create a legal mechanism in the civil law to deal with the problem of difficult-to-deter defendants, one would more likely invent restitution than punitive damages.

Suppose I leave my San Diego home empty one weekend so that I can attend a conference on the law of remedies at Washington & Lee University. Unbeknownst to me, there is a hotel workers strike in San Diego and room rates have sky-rocketed. My neighbor, sensing an opportunity to make a profit, rents out my home for \$1,000 to a couple of travelers who would otherwise have had to pay a hotel that same amount. They leave the house in perfectly good order and they even feed my cat. Few courts would have difficulty awarding me \$1,000 (the amount of my neighbor's gain) even though my loss may be far less than that. I may even be secretly pleased to have earned that much money in the ensuing litigation.⁵³

this category of conduct generally will be able to make such a claim. Indeed, this is the stuff of which the law of restitution is made. *See also* *Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946) (making distinctions between these kinds of cases is the function of the law of unjust enrichment).

52. *See* Christopher T. Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 EMORY L.J. 153 (1996).

53. An economist might say that defendant has committed a wrong regardless of whether I am significantly harmed by the conversion, because the defendant has deliberately avoided the market mechanisms that would have demonstrated more accurately whether he or I could make better use of the home. Since he never sought my permission to rent out my home, the court

In what way does restitution solve the problem raised in Part II concerning punitive damages' awkward fit into the civil system? Like punitive damages, restitutionary damages can be characterized as an anomaly in the civil law. They are not compensatory. Instead they focus on the defendant and his gain.⁵⁴ Unlike punitive damages, however, restitution is not open-ended. It therefore fits into the civil system with far more grace than punitive damages. Jurors who are asked to assess restitution know that their job is to put the defendant in a place he would have been but for his wrongdoing. This does not mean that restitutionary damages are easy to calculate. There are at least as many difficulties in assessing them as there are in assessing compensatory damages. It does mean, however, that the jury is not in a position simply to adopt whatever figure its members deem appropriate.

Under a punitive damages regime, we ordinarily expect (and juries most often gratify our expectation) the most egregious conduct to result in punitive damages—at least when that egregious conduct is committed by very solvent defendants. But if super-compensatory damages are needed in certain cases to assure effective deterrence, the concept of “egregious conduct” probably fails to capture what is significant about this subset of cases. Rather than reprehensible conduct, conduct that is difficult to deter on account of its benefit to the defendant should be sought. Otherwise, whatever ill will or spite the defendant may harbor, compensatory damages will still be sufficient.

Finally, restitution helps to solve the problem of the seeming randomness of punitive damages awards, since the application of restitution is more common law-driven than jury-driven. Over the centuries, common law courts have sorted out cases for which restitution is the proper remedy from those for which it is not by using common law case-by-case analysis.⁵⁵ Such a method is likely to yield a more predictable body of law precisely because the

can never know for sure whether his gain really outweighed my loss. Therefore, since I never had the opportunity to bargain over the matter, thereby demonstrating my true preferences, the court can only speculate. Since it is possible that my losses are as great or greater than defendant's loss, the court can and will likely order defendant to turn over his profit. Next time, he'll consult me first.

54. See Wonnell, *supra* note 52, at 154.

55. See *id.* at 160–61.

decision makers are operating under the doctrine of *stare decisis*. The current problem of randomness is largely the result of the fact that discretion to award punitive damages is lodged in a jury, deciding a single case in a vacuum.

V. PATTERNS OF MISCONDUCT

Patterns of misconduct admittedly yield special problems. Suppose, for example, my entrepreneurial neighbor rents out the homes in the neighborhood when the owners are away whenever there is an unexpected hotel room shortage. He has been lucky though, since he only gets caught about twenty-five percent of the time. In that situation, if I were to sue him, neither compensatory damages (which in my case may be quite low) nor restitution (which in my case will amount to \$1,000) will cause him to stop his conduct. He can expect to gain \$4,000 for every \$1,000 he pays in restitution.

One way to deal with this problem is to assess multiple monetary awards.⁵⁶ If, for example, the jury specifically finds that my neighbor gets caught only one in four times when he rents out neighborhood homes, I should be awarded four times the otherwise appropriate restitutionary sum.⁵⁷

The danger in this approach lies in its flexibility. How do we know that he gets caught one-quarter of the time? Where does that testimony come from? What goes into the numerator of that fraction? What goes into the denominator?

Suppose my neighbor sometimes rents out neighborhood homes, sometimes rents out his mother's home, sometimes uses other people's backyards for his own entertainment, and sometimes steals their stereo equipment. The likelihood that he will get caught on any of his escapades depends on the types of activities and the care he takes to avoid detection. His mother frequently catches him, but she never does anything about it. Overall, the neighbors catch him about one quarter of the time, but families with children catch him more than families without children. Further, he has never been caught for stealing stereo equipment. Should all that be considered one course of conduct? Or should the renting of homes of non-related persons be the relevant course?

56. See Polinsky & Shavell, *supra* note 6, at 874-75, 954.

57. For cases in which compensatory damages would be the appropriate measure of damages, multiples of that amount could be awarded.

Discretion in determining what constitutes a course of conduct can be almost as serious a problem as discretion in determining punitive damages. Abuse is to be anticipated. Unpopular defendants are more likely to have their conduct viewed as a pattern. More popular defendants may have their sins viewed in isolation.

Perhaps the better course is to forgo such calibrations. It is true that a civil defendant who is not subject to a multiplier may be under-deterred if his wrongful course of conduct goes undetected by some of his victims. However, civil law is not the only legal system operating to deter inappropriate conduct. Indeed, it is not even the primary one.

The civil law is an important part of a system of legal and social sanctions that work to encourage appropriate conduct. It is cheaper and more efficient than the criminal system for many kinds of low-level and isolated misconduct. For more serious kinds of misconduct, it often functions alongside an elaborate criminal and regulatory system. One reason that particular conduct might be considered serious is precisely because it is repeated.

Indeed, one of the problems with punitive damages is that they can be redundant. Not only will defendant pay compensatory and punitive damages, he will also face the criminal law.

The more extensive defendant's culpable course of conduct, the more likely it will come to the attention of the public prosecutor, the regulatory authorities, or the legislature. If they all pile on, there is no need for punitive damages; and if they do not, as in the case of *BMW of North America, Inc. v. Gore*,⁵⁸ one is left to wonder whether the jury's decision to impose punitive damages was wrongheaded in the first place. Given the potential for abuse, the most appropriate course may be to avoid heroic efforts to address patterns of misconduct in the civil system.

VI. CONCLUSION

No legal scholar with the gift of wisdom will look to American law in search of perfect logical symmetry. We Americans are not fastidious about our legal categories and the boundary between civil and criminal law is no exception. As Oliver Wendell Holmes said in

58. 517 U.S. 559 (1996).

his famous dictum, our law is built not by "logic" but by "experience."⁵⁹

That does not mean, however, that every anomaly in the law must be lovingly preserved no matter how wrongheaded. In addition to failing the logic test, punitive damages are arguably failing the experience test. There is good reason for the skepticism with which they are currently held. Punitive damage defendants receive neither the kinds of protection ordinarily afforded criminal defendants nor the kinds of safeguards usually given to civil defendants.

There are a number of possibilities worthy of consideration for reforming this area of the law. Some have suggested that punitive damages be "criminalized" in the sense that some of the criminal procedural safeguards, such as the requirement of proof beyond a reasonable doubt, be applied to them.⁶⁰ In this Article, I have touched on the possibility of "civilizing" punitive damages: making them fit more gracefully in the traditional run of civil cases by equating them with restitution. However, there are many difficulties with such an approach. What constitutes a single act for the purposes of determining unjust enrichment? What should be done if the defendant has engaged in a pattern of misconduct that is likely to be uncovered only some of the time? I have suggested that the former question is one that common law courts have been struggling with for a long time. In response to the latter question, I have suggested that it must be remembered that many wrongs that involve multiple occurrences have already produced legal responses that may be superior to punitive damages.

59. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Harv. Univ. Press 1963) (1881).

60. See Heriot, *supra* note 4, at 155-56.